Paramount Liquor Company *and* Miscellaneous Drivers, Helpers and Public Employees Local Union 610, affiliated with International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America. Case 14-CA-16399

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 November 1983 Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent submitted an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] Since we are dismissing the complaint in this case, we find it unnecessary to pass on the Respondent's motion to reopen record.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, we note that in setting out the facts here the judge inadvertently misquoted the letter that the Respondent sent the Regional Office 15 January 1983 concerning its plans to lay off employee Raymond Fisher. Whereas the judge indicated that "[t]he employer does anticipate employing an additional checker in the foreseeable future," the letter itself reads that "(t)he employer does *not* anticipate . . . ." (Emphasis added.) We find that correcting this error does not affect the judge's ultimate conclusions.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried before me in St. Louis, Missouri, on May 26, 1983, pursuant to a charge filed by Miscellaneous Drivers, Helpers and Public Employees Local Union 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Union, on January 4, 1983 as amended on February 3, 1983, and a complaint issued by the Regional Director for Region 14 of the National Labor Relations Board, the Board, on February 14, 1983. The complaint alleges that Paramount Liquor Company, the Respondent, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, the Act, by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit, by unilaterally transferring work out of the bargaining unit, and by laying off and refusing to reinstate Raymond Fisher. The Respondent, by it's timely filed answer, admitted that it had refused to recognize and bargain with the Union in order to test that Union's certification, and further admitted that it had laid off and failed to reinstate Raymond Fisher. It denied that the layoff of Fisher was discriminatorily motivated and denied that it had taken any unilateral action. Finally, it contended that the issue with respect to the Board's certification was moot as the unit had been reduced to a single individual.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent is a Missouri corporation engaged at St. Louis, Missouri, in the nonretail sale and distribution of wines and spirits. The complaint alleges, the Respondent admits, and I find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For a number of years, the Respondent's drivers have been represented by the Union, Local 610. The Respondent's warehouse employees are represented by Teamsters Local Union No. 688, herein called Local 688.[1] Since 1974, by agreement of the parties, employees in the checker classification have been excluded from the warehouse unit.

On May 19, 1982,[2] the Union filed a petition, Case 14-RC-9598, seeking to represent the Respondent's checkers. Following a hearing in which Local 688 was permitted to intervene, the Acting Regional Director for Region 14, on June 23, issued a Decision and Direction of Election. Therein, the Acting Regional Director re-

[1] Included within that unit are leadmen, shipping clerks, receiving clerks, driver-helpers, truck spotters, and warehousemen.

[2] All dates hereinafter are 1982 unless otherwise specified.

jected the Respondent's contentions with respect to an alleged contract bar, inappropriateness of unit, and the managerial, supervisory, or guard status of the checkers, and denied the Respondent's motion to dismiss the petition. A self-determinatlon election was directed among the following employees:

> All checkers employed by the employer at its 6501 Hall Street, St. Louis, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

Pursuant to the terms of that directed election, "If a majority of the employees in the voting group vote for the representation by the petitioner [Local 610], they will be taken to have indicated their desire to constitute a separate unit," which the Acting Regional Director found appropriate for the purposes of collective bargaining. A vote by a majority of those employees for representation by Local 688 would have resulted in their inclusion within Local 688's warehouse unit. A majority vote for neither of the two Unions, of course, would have been deemed an expression of the employees' desire to remain unrepresented.

The Respondent requested review of the Decision and Direction of Election. Review was denied by the Board on July 22.

On July 23 an election was held. There were two eligible voters, both of whom voted for representation by the Union. On August 2, the Union was certified, pursuant to Section 9(a) of the Act, as the exclusive representative of the employees in the above-described appropriate unit.

B. *The Request to Bargain and the Respondent's Refusal*

In August, the Respondent and Local 610 mutually agreed that bargaining for the checkers' unit would begin after completion of the negotiations with respect to the drivers' unit. On October 19, the Union's business representative William Van Hoose wrote the Respondent's attorney Ned Holland enclosing proposals and requesting that Holland contact him to begin negotiations with respect to the checkers. Van Hoose received no response. In early December, he called Holland and was asked by Holland to take copies of the proposals to the Respondent's vice president Dale Griffin. He did so on December 19 and was promised a response. On December 30 Griffin responded. In his letter, he contended that the Board's decision was in error, and he repeated the arguments made in opposition to the Regional Director's decision. He informed the Union that the the Respondent would decline to bargain with the Union in order to obtain judicial review of the Board's determination.

C. *Notice and Bargaining Concerning the Layoff of One Checker*

On January 10, Griffln wrote Van Hoose, stating:

> We are contemplating a reduction in forces of one checker. . . . Without prejudice to or waiver of our obligations that we have now to bargain with Local No. 610 about the checkers, we are willing to meet with you to bargain about the contemplated reduction in forces of one checker.

He offered to meet at Van Hoose's earliest convenience.

On January 15, the Respondent's counsel wrote the Board agent investigating the Union's earlier filed unfair labor practice charge, informing the Regional Office of its planned reduction in force. In that letter, counsel described the Company's plans fot reductions in force in several areas in some detail and stated, with respect to the checker:

> . . . the employer currently has two checkers who are not involved in any supervisory functions. As part of the general company-wide reduction in force, the employer plans to lay off Ray Fisher, the less senior checker. The employer does anticipate employing an additional checker in the foreseeable future. . . . [T]he reduction is expected to take place on Monday, January 17.

The letter concludes with counsel's argument that the layoff of Fisher would reduce the checker bargaining unit to one employee, wherein no bargaining would be ordered by the Board.

On January 18, the Respondent's night warehouse manager Gene Dohrendorf asked Fisher whether anybody had said anything to him about a layoff. Fisher said that no one had but he understood that somebody would be laid off. Dohrendorf told Fisher it would probably be him and that the layoff would result in Dohrendorf having to do more checking.

The Union's president Jack Kuper and Van Hoose met with the Respondent's general manager Griffin, its operations manager Dan Marler, and its attorney on the morning of January 20. Twenty or 30 minutes of a meeting which lasted about 2-1/2 hours was devoted to the checker issue. The Respondent's representatives told the Union that they wanted to lay off a checker and had hired another night supervisor who would be assisting the checker and performing the checker's job when the checker was on breaks. The Union objected to the use of supervisory personnel to perform bargaining unit work and offered to permit the Respondent to make one of the checkers a leadman if Respondent felt it needed more supervision. The Respondent replied that it wanted someone with the authority to hire and fire employees and to assign or recommend discipline, i.e., someone with greater authority than a leadman. The Union offered to represent the Respondent's supervisors if recognition was voluntarily extended. The Respondent believed that this offer was made in jest and rejected it. The Respondent then said that they were going to go ahead and lay a checker off; the Union was asked how it wanted it done, by merit or by seniority. Van Hoose replied that if it was going to be done, it should be done by seniority.

Griffin testified that Marler had recommended, and he had agreed, to a reduction in force among the checkers sometime after the Respondent's January 10 letter. The selection of Fisher for layoff, Marler testified, was made

on January 20. Fisher was the least senior checker but might have been retained if the Union had chosen merit, rather than seniority, as the basis for layoff. Fisher was laid off on January 21.

D. *The Checker's Duties—Past and Present*

The Respondent's warehouse is a large facility, approximately 135,000 square feet, consisting of several bays for the storage of liquor, and conveyors to move product from the bays past the checkers and to the loading docks. At the time of Fisher's layoff, it was staffed by 2 supervisors, Dohrendorf and Hollinshed, 2 checkers, Kenneth Maurer and Fisher, and approximately 13 warehousemen. There have been two checkers on the night shift since 1978.

The checkers' duties consist of checking the brand, size, and vintage or proof of product shipped in full cases; bottle checking, which is the counting the bottles in less-than-full case orders to determine that the number matches that required by the invoice; marking the invoice numbers on the side of the cases; matching invoices to manifests; and separating the various copies of the invoices.

Prior to January 21, the night shift would begin with one checker working in the office, with a supervisor, from about 10:30 p.m. to 1 a.m., matching invoices to manifests. The other checker would bottle check for about the first 70 minutes and would then check cases until the first checker came down from the office. Thereafter, they would alternate case and bottle checking every five trucks. The supervisors would do a small amount of bottle checking but no case checking except when they filled in for absent checkers.

Hollinshed, the night warehouse supervisor, had been employed in that capacity since October 1982. From the start of his employment, there were two supervisors on the night shift, Dohrendorf and Hollinshed. Before March 1982, Ken Maurer had been referred to as a checker supervisor or assistant supervisor, had been salaried, and had performed some supervisory functions. Maurer gave up those responsibilities, at his own request, in March 1982 and went on an hourly paid basis (without loss of earnings). Before Fisher started in September 1981, Bob Lange was also a "night checking supervisor." He worked in that capacity with Maurer from October 1979 and had the same responsibilities and authority as Maurer. He is now a supervisor on the day shift. From March 1982 until Hollinshed was hired, there was only one person in the warehouse on the night shift who was referred to as a supervisor or who possessed supervising authority.

Since January 21, the remaining checker spends approximately the first hour of his shift matching invoices and manifests in the office, together with a supervisor. There is no case checking and no trucks are loaded during that period; the warehouse crew works in the bottle area at that time. Thereafter, the checker checks cases and is relieved by a supervisor for one truck after every five that are loaded. On the average, 18 trucks are loaded during each night shift. It takes a checker approximately 18 to 20 minutes to check cases for each truck. The checker also strips the invoices, removing the government copies, at various times during his shift. Virtually all of the bottle checking is now being done by the supervisors; they spend between 4 and 5 hours per night performing that function.

E. *Evidence of Motivation*

About a week prior to the July 23 election, Griffin and Maurer had a lengthy conversation. In that conversation, Griffin told Maurer that he preferred that the employees not join the Union or seek outside representation but that, if they had to join a Union, he would prefer that they join Local 688 rather Local 610. Local 610, according to Griffin, was very aggressive; it was easier for the Respondent to do business with Local 688 which understood the business point of view better. In a conversation in the month following the election, wherein Griffin offered Maurer a different job, Griffin told Maurer that he was sorry that Maurer had voted to join Local 610.

The Respondent's preference for Local 688, the General Counsel argued, was further shown by Griffin's December 30, 1982 letter to Van Hoose. In that letter, after asserting the Company's belief that the checkers were either surervisory, managerial, or guards, Griffin stated the Respondent's belief that if the cherkers were to be part of any unit, they should be included within Local 688's warehouse unit.[3]

F. *The Employer's Economic Defense*

The Respondent, denying that its layoff of Raymond Fisher was discriminatory motivated, asserted that that layoff was one of a number of actions taken to reduce costs in the face of worsening economic circumstances. Thus, the Respondent had sustained its first unprofitable year in fiscal 1982. Summaries of its business activity indicate that its sales, in terms of gross dollars and both individual bottles and cases of liquor, were essentially stagnant or slightly lower from fiscal 1981 through fiscal 1982 and into fiscal 1983. From 1978 through 1982, sales, when adjusted for inflation, decreased approximately 17 percent with more than 6 percent of that decrease occurring from late 1981 through the end of 1982. The final quarter in calendar year 1982, the quarter in which nearly one third of the Respondent's sales are achieved, was lower by nearly $300,000 than the same quarter for the year preceding.[4]

The record reflects that for some time the Respondent had been taking steps to meet the economic conditions it was facing. From July 1, 1981, through September 1982, six individuals in sales and administration were laid off.

[3] The General Counsel asserted at hearing that a January 21 conversation between Operations Manager Dan Marler and Maurer further evidenced animus. I do not find that that conversation, wherein Marler expressed anger at Maurer's suggestion that Fisher be laid off for only portions of each workweek rather than be permanently and fully laid off, evidences animus toward the employees' support for Local 610.

[4] While the foregoing figures are taken from compilations of the Respondent's records which were prepared in anticipation of this litigation, the General Counsel had been afforded opportunities to examine the underlying documents, did not dispute their authenticity, and, in the main, did not object to their receipt in evidence. This record provides no basis on which to disbelieve the economic assertions contained in the Respondent's exhibits.

An additional seven, including three drivers, two warehousemen, and Fisher, were terminated or laid off from October 1, 1982, through February 1, 1983, as discussed in more detail infra. Overall, there was a decrease of 27 employees (out of approximately 160) from the first quarter of calendar year 1982 to the first quarter of calendar year 1983.

Dan Marler became the Respondent's operations manager in September 1982 and at that time was directed by Griffin to reduce the Respondent's costs. Shortly after assuming his position, Marler spoke with the employees and solicited their cooperation. He told them of the Company's efforts to reduce its expenses, to reduce both the amount of overtime work and its use of casual drivers. Changes, he said, were going to be made. As he stated, the amount of overtime hours worked in the warehouse on both the day and night shifts were reduced substantially in virtually every month following September and the hours of work by casual employees was similarly reduced or eliminated in each month. In October, one over-the-road driver was terminated and his duties were assumed by a subcontractor. A routing clerk was laid off at year's end and two warehousemen were laid off on January 10, 1983, 2 weeks before Fisher's layoff. Two drivers were laid off on February 1, 1983.[5]

The Respondent has hired no replacement for Raymond Fisher. The work he did is now performed by the night-shift supervisors.[6]

The General Counsel, contending that the Respondent's economic defense is but a pretext, notes that the Respondent added a more expensive employee to the night shift prior to laying Fisher off. Thus, Hollinshed was added to the night-shift staff as a supervisor at an annual salary of $21,500. Fisher's wage at the time he was laid off totaled $15,750 per annum. The Respondent, however, argues that its need for an additional supervisor on the night shift warranted the change. Thus, its notes that prior to March 1982, and from at least the beginning of 1978, the night shift included one statutory supervisor, Dohrendorf, plus two checkers who were at least leadmen, and who exercised the functions of the supervisor in the supervisor's absence. Prior to 1978, the night warehouse manager had done all of the bottle checking and even after that date, the supervisor continued to perform checking functions in the absence of either of the checkers and to do some bottle checking even when they were present. At the start of Fisher's employment, there was one supervisor on the shift plus Maurer who retained at least leadman if not supervisory responsibilities until March 1982. The only period wherein there was but one supervisor unsupported by assistant supervisors or leadmen was from March until October 1982, when Hollinshed was given supervisory responsibilities on the night shift. Thereafter, and until Fisher's layoff, there were two supervisors and two checkers. Hollinshed was in place for over 3 months at the time of Fisher's layoff; no one else was hired to assume his duties. As previously noted, the supervisors, Dohrendorf and Hollinshed, or Kristof in Hollinshed's place, are doing the checking work. At the present time there is between 4-1/2 and 6 hours per night of case checking work; this work is being done by Maurer who also spends some time each evening matching invoices to manifests with one of the supervisors. There is approximately 4 to 5 hours per night of bottle checking work, which is done by the supervisors.

The Respondent claims that it needs two supervisors in the warehouse because it is a large area and there are times when one of the supervisors is in the office and not on the warehouse floor. It was pointed out that there are presently 13 warehouse employees with 2 supervisors on the night shift. On the day shift, there are also two supervisors, supervising six warehouse employees.

G. *Analysis and Conclusions*

1. Termination of Raymond Fisher—Section 8(a)(3)

The General Counsel asserts that "Respondent's layoff of Fisher was simply a means to avoid bargaining with Teamsters 610." The evidence on which the General Counsel relies establishes that the Respondent wished to avoid having to bargain with Local 610 over the checker positions, had exrressed that position prior to the election, knew that the elimination of one checker position would render its bargaining obligation nugatory, and transferred Fisher's checking duties to a supervisory employee who continued to perform those duties.

Assuming that the foregoing evidence establishes a prima facie case, I must conclude, in agreement with the Respondent, that a valid economic defense has been presented to rebut the evidence of discrimination. Thus, I note that the uncontradicted facts establish that the Respondent suffered its first loss in fiscal year 1982, and that its managers had expressed concern over the Company's economic direction and had begun to take steps to stem the economic tide. Thus, it eliminated or substantially reduced overtime and the use of casual employees. Employees in every category were laid off and not replaced starting some months prior to Fisher's layoff. And, whlle it is true that Fisher's duties continued to be performed after his layoff, they were performed by a supervisor who had been hired approximately 3 months earlier with no further personnel being added to perform this function. This case is thus distinguishable from *Coil-ACC, Inc.*, 262 NLRB 76 (1982), cited by the General

[5] The General Counsel contends that the layoff of these warehousemen and drivers in January and February has little significance because they continued to work, on call, subseguent thereto. The record reflects that there was only 1 day of work for these warehousemen prior to the end of March. Since that time they have worked some hours in nearly every week with their hours coming close to those which they worked in the same weeks during the preceding year. Similarly, the drivers, who had worked little in the 4 weeks preceding their layoffs, worked some hours in the 8 weeks following their layoff and then began to work substantially greater numbers of hours, approaching, or in one case exceeding, the hours they had worked weekly in the preceding year.

[6] The Respondent further contended that a portion of the checkers' work, the bottle checking, had been changed to spot checking from complete, bottle by bottle checking of less-than-full case orders, pursuant to Marler's instruction. The record, however, would indicate that bottle checking is still being done as it had been when Fisher was employed. Thus, Kristof (who swapped shifts with Hollinshed) testified that an individual can check about 1000 bottles per hour; the record reflects that each night's work includes approximately 4000 bottles, and Kristof and Dohrendorf still spend about 4 to 5 hours per night checking bottles.

Counsel. In that case, the terminated employee was replaced by a newly hired casual employee and, subsequently, by another employee. There was adequate work for the terminated employee. Here, considering the number of hours required for performance of the checking duties, a total of not more than 12 per shift, it is clear that the checking functions could be performed by one checker and a supervisor. Moreover, I note that the Respondent's supervisors had always performed some of the checking functions and the arrangement which was established after Fisher's layoff was similar to the practice followed prior to 1978.

The General Counsel further contended that if the Respondent was truly concerned with saving money it would not have replaced Fisher with the more expensive services of Supervisor Hollinshed. However, by doing so, the Respondent was able to secure both the checking services it required and the additional supervision which it desired. This level of supervision was consistent with its past practices in the warehouse on both the day and night shift. In this regard, I note that, except for a brief period, the Respondent always had at least one supervisor and one or two leadmen (who may or may not have had actual supervisory authority within the meaning of Section 2(11) of the Act) on the night shift and, for a much smaller work force, has two supervisors on the day shift. Considering this practice, the size of its warehouse, the duties of the supervisors which may require them to leave the warehouse floor during the shift, and the nature of the product, it cannot be said that the Respondent's desire to have two "real" supervisors on the night shift was unreasonable or a sham.

The General Counsel contended that the layoff of other people, notably two warehousemen and two drivers, should carry little weight in determining the validity of the Respondent's economic defense inasmuch as those individuals continued to perform substantial amounts of work for the Respondent after their layoffs. In fact, however, the laid-off warehousemen did not work at all for 2 months following their layoffs, and the drivers worked very little. In the 4 months following their layoffs, all but one of them worked half or less the number of hours they had worked in the prior year and, as the Respondent points out, there were some savings to the Respondent in taking these employees off the rolls of permanent employees.

Accordingly, for all of the foregoing reasons, I must conclude that the Respondent has established that one checker would have been laid off whether or not Local 610 had been certified as the checkers' representative. I shall therefore recommend dismissal of the allegation that Fisher's layoff was discriminatorly motivated.

2. The Respondent's alleged failure to bargain over the layoff of a checker and the transfer of unit work

The General Counsel submits that the evidence establishes that there was no meaningful good-faith negotiations regarding the transfer of work and layoff of a checker. Rather, there was a meeting to announce a fait accompli. In support of this position the General Counsel has introduced evidence showing that the Respondent, in its January 10 letter to Van Hoose, its January 15 letter to the Board, and Dohrendorf's January 18 conversation with Fisher, clearly indicated that it had made up its mind concerning both the action to be taken, a layoff, and the person to be laid off. The General Counsel also points to the fact that the meeting to discuss the layoff was brief and the Respondent neither offered alternatives nor expressed any willingness to accept the Union's suggested alternative that one of the existing checkers be made a leadman. The Respondent, citing *Globe-Union*, 222 NLRB 1081 (1976), and *Burns Ford*, 182 NLRB 753 (1970), argues that the Board has found similar notice periods and bargaining opportunities adequate. I am constrained to agree with the Respondent. Thus, in the instant case the Respondent made a decision to lay off one checker and essentially concluded that Fisher would be the employee to suffer that layoff. The Respondent's communications indicate that the Respondent was reasonably certain that this would be the course of action it would follow; however, the decision was at least somewhat tentative. The Union was given 11 days' notice and no final decision was made until after a meeting between the Respondent and the Union. These facts are essentially on all fours with both of the cases cited by the Respondent. Thus, in *Globe Union*, the company, shortly after the union was certified, drew up a tentative plan to reassign work from the unit and advised the Union that the unit would probably be reduced by six employees. The union objected to the removal of unit work but did not request to meet; neither did the employer initiate a request to bargain. Six days later management approved its own plan and, on the 7th day, the union was notified of the plan, including the names of the six employees to be laid off. The union was told that the issue was bargainable but made no request to bargain and the plan, including the layoffs, was implemented the following day. The Board, reversing its administrative law judge, found that the company's decision was tentative when announced to the union and that meaningful bargaining was possible. Similarly, in *Burns Ford*, the employer, acting only 3 weeks after the representation election, notified eight employees that they would be laid off in 6 days. The union was given notice at the same time. The administrative law judge found that the employer's announcement was fait accompli; he found violations of both Section 8(a)(3) and (5). The Board, reversing, found that the employer had, as here, a lawful business motivation for its actions and further found that the union had been given an opportunity to bargain. That employer, the Board found, gave the union reasonable notice of the impending layoff and afforded the union an opportunity for discussion. Therefore, it found no 8(a)(5) violations. The cited cases, particularly *Burns Ford*, are controlling and I must conclude that here as there, the union was given adequate notice of the impending layoff and was afforded an ample opportunity for discussion. I shall therefore recommend that the 8(a)(5) allegation pertaining to the alleged unilateral change be dismissed.

3. The technical 8(a)(5) violation

It is not disputed that the Respondent refused to bargain with the Union which was certified by the Board in an appropriate collective-bargaining unit in order to test that certification. The Respondent, however, argues that inasmuch as the checkers now comprise a one man unit, Board precedent precludes the issuance of a bargaining order, citing, *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), *Stern Made Dress Co.*, 218 NLRB 372 (1975), and *Foreign Car Center*, 129 NLRB 319 (1960). In all three of those cases, the Board found that there was only one person in the unit at the time of the demand and/or when the employer refused to bargain. In those circumstances the Board held that no bargaining order was warranted and dismissed the complaints. In the instant case, the unit consisted of two employees when certified, when the Union demanded recognition, and when the Respondent refused it. It was only subsequent thereto that the unit was reduced to a single individual. In such circumstances, the Board places upon the employer the burden of establishing that the reduction to a single person unit is permanent before it will find that the bargaining obligation has been terminated. See *Crispo Cake Cone Co.*, 190 NLRB 352 (1971), and *Westinghouse Electric Corp.*, 179 NLRB 289 (1969). Here, Fisher was told, upon his layoff, that it was permanent. Since that time, he worked on only one occasion, for about 48 hours, to replace an absent checker. This subsequent work is not sufficient to establish that he was more than a casual employee at that time. He was not replaced with another unit employee. General Manager Griffin testified that in determining whether a cherker should be laid off he and Operations Manager Marler concluded that "there just wasn't a job there any longer."[7] Griffin testified that he and Marler believed they "did not need two [checkers for] . . . at least the up coming quarter." He further testified that neither Fisher nor any of the warehouse or driver employees had been called back other than to fill in for employees who were ill or on vacation. He did not anticipate calling any back on a full-time basis in the foreseeable future. Moreover, the layoff was warranted not only by falling case sales over a long period but also by a drop in the value of the goods being sold, thereby reducing the Respondent's profit margin, factors which are less likely to be transient than a short-term drop in sales.

Based on the foregoing, I am satisfied that the Respondent has met its burden of proving that the reduction of its checker bargaining unit to one individual was permanent and that it has extinguished its obligation to bargain with the Union as representative of the employee in that unit. Accordingly, I shall recommend that the complaint be dismissed.

CONCLUSION OF LAW

The Respondent has not engaged in the unfair labor practices alleged in the complaint.

On the basis of the foregoing findings of fact and conclusion of law and on the entire record in this proceeding, I issue the following recommended[8]

ORDER

The complaint is dismissed in its entirety.

[7] I do not believe that this statement is inconsistent with the reassignment of some checking duties to supervision.

[8] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.